



New York State Department of Labor  
David A. Paterson, Governor  
Colleen C. Gardner, Commissioner

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September 13, 2010

[REDACTED]

Re: Request for Opinion  
Newspaper Delivery Employees  
RO-10-0087

Dear [REDACTED],

This letter is written in response to your letter which was received by this office on June 7, 2010, in which you request clarification as to the newspaper delivery exemption to the federal Fair Labor Standards Act (FLSA), which is contained in Section 13(d) of that Act. In short, your letter states that the newspaper delivery exception does not have specific tests and criteria for determining its applicability, as do many of the other exemptions to the FLSA, and that the vagueness of that exception results in employees being underpaid. In particular, you note that language referring to the "primary duties" of the employee needs clarification and that some specific guidelines would aid both employees and employers in this industry in understanding their rights and obligations.

We agree that clarity and guidance information is extremely helpful in allowing individuals to better understand their rights under the law and in fostering employer compliance. Unfortunately, based on the nature of your request and the fact that it deals exclusively with the FLSA, no opinion can be provided by this Department nor are we in a position to issue such guidance for the public. The FLSA is a federal law enforced by the United States Department of Labor. Therefore, please be advised that it would not be appropriate for this Department to provide interpretations of that Act as we have no jurisdiction over its enforcement. If you wish to obtain a formal opinion with regard to the interpretation of the FLSA or to suggest that new, clearer language be included in their guidance documents, you should direct your request to the United States Department of Labor, Wage and Hour Division. You can consult your local phonebook to find the office of the USDOL nearest your home or office or you may go to the USDOL website, [www.dol.gov](http://www.dol.gov) for further information in this regard.

It is important to note, however, that the FLSA does not prevent the states from enacting wage and overtime laws and regulations that are more beneficial to workers than the FLSA (*see* 29 U.S.C. §218; *Manliguez v. Joseph*, 226 F. Supp.2d 377 (EDNY 2002)). Regulations adopted pursuant to the New York State Minimum Wage Act do contain some overtime requirements that apply to

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employees who are otherwise exempt under the FLSA, including employees exempted under the newspaper carrier exemption of the FLSA. The New York State Minimum Wage Act, which contains the State minimum wage and overtime provisions, generally applies to all individuals who fall within its definition of "employee." (*see*, Labor Law §651 *et seq.*) Section 651(5) defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories of workers from that definition. (*see*, Labor Law §651(5)(a-o).) Newspaper or newspaper delivery employees are not excluded, thereby leaving such employees within the protections of the State Minimum Wage requirements.

Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all "employees" must be paid at a rate not less than one and one half times their regular rate of pay in accordance with the provisions and exceptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime at a rate not less than one and one half times the minimum wage. In short, "exempt" employees under Section 13 of the FLSA must be paid at a rate of not less than one and one half times the minimum wage for overtime hours worked unless such employees fall outside of the New York Minimum Wage Act's definition of "employee." Accordingly, employees within the newspaper delivery exemption of the FLSA are nevertheless required to be paid not less than one and one half times the minimum wage rate for all overtime hours worked.

Lastly, please note that the issue of whether a newspaper carrier is acting as an employee or an independent contractor may also be relevant to the determination of your entitlement to overtime compensation. The information contained in your letter is not sufficient to allow us to make a determination in this regard.

This opinion is based exclusively on the facts and circumstances described in your letter which was received by this office on June 7, 2010, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,  
Maria L. Colavito, Counsel

By:   
Michael Paglialonga  
Assistant Attorney I

CC: Carmine Ruberto